

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

EUGENE H.,

Plaintiff,

CASE NO. C22-5474-MAT

V.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

ORDER RE: SOCIAL SECURITY  
DISABILITY APPEAL

Plaintiff appeals a final decision of the Commissioner of the Social Security Administration (Commissioner) denying Plaintiff's application for disability benefits after a hearing before an administrative law judge (ALJ). Having considered the ALJ's decision, the administrative record and all memoranda of record, this matter is REVERSED and REMANDED for further administrative proceedings.

## **FACTS AND PROCEDURAL HISTORY**

Plaintiff was born on XXXX, 1982.<sup>1</sup> Plaintiff has limited education and has no past relevant work. AR 28. Plaintiff filed an application for Supplemental Security Income (SSI) on November 19, 2018, alleging disability beginning August 27, 2018. AR 19. The application was denied at the

<sup>1</sup> Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 initial level and on reconsideration. On April 20, 2021, the ALJ held a hearing and took testimony  
2 from Plaintiff and a vocational expert (VE). AR 104–30. At the hearing, Plaintiff amended the  
3 alleged disability onset date to November 19, 2018. AR 19, 114. On May 10, 2021, the ALJ issued  
4 a decision finding Plaintiff not disabled. AR 19–29. Plaintiff timely appealed. The Appeals  
5 Council denied Plaintiff’s request for review on April 26, 2022, making the ALJ’s decision the  
6 final decision of the Commissioner. AR 1–6. Plaintiff appeals this final decision of the  
7 Commissioner to this Court.

8 **JURISDICTION**

9 The Court has jurisdiction to review the ALJ’s decision pursuant to 42 U.S.C. § 405(g).

10 **STANDARD OF REVIEW**

11 This Court’s review of the ALJ’s decision is limited to whether the decision is in  
12 accordance with the law and the findings are supported by substantial evidence in the record as a  
13 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). “Substantial evidence” means more  
14 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable  
15 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750  
16 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ’s  
17 decision, the Court must uphold the ALJ’s decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th  
18 Cir. 2002).

19 **DISCUSSION**

20 The Commissioner follows a five-step sequential evaluation process for determining  
21 whether a claimant is disabled. *See* 20 C.F.R. § 416.920.

22 At step one, the ALJ found that Plaintiff had not engaged in substantial gainful activity  
23 since the alleged onset date. AR 21.

1 At step two, the ALJ found that Plaintiff has the following severe impairments:  
2 degenerative disc disease; obesity; personality disorder; depression; and anxiety. AR 21. The ALJ  
3 also found that the record contained evidence of mild obstructive sleep apnea and carpal tunnel  
4 syndrome; however, the ALJ found that these conditions did not rise to the level of severe. AR  
5 21–22.

6 At step three, the ALJ found that Plaintiff's impairments did not meet or equal the criteria  
7 of a listed impairment. AR 22–24.

8 At step four, the ALJ found that Plaintiff has the residual functional capacity (RFC) to  
9 perform light work, as defined in 20 C.F.R. § 416.967(b), with the following limitations:

10 [H]e can occasionally climb ramps and stairs, never climb ladders  
11 ropes or scaffolds, occasionally stoop, kneel, crouch and crawl. He  
12 can frequently handle and finger. He must avoid concentrated  
13 exposure to vibration and should avoid all exposure to workplace  
hazards. He can perform simple routine tasks and have occasional  
superficial interaction with coworkers and the general public.

14 AR 24. Finding that Plaintiff has no past relevant work, the ALJ proceeded directly to step five.  
15 AR 28.

16 At step five, the ALJ found that Plaintiff is capable of making a successful adjustment to  
17 other work that exists in significant numbers in the national economy. AR 28–29. With the  
18 assistance of a VE, the ALJ found Plaintiff capable of performing the requirements of  
19 representative occupations such as bakery worker and photo copy machine operator. AR 29.

20 Plaintiff raises the following issues on appeal: (1) Whether the ALJ properly evaluated the  
21 medical evidence; (2) whether the ALJ properly evaluated Plaintiff's testimony; (3) whether the  
22 ALJ properly evaluated the lay evidence; and (4) whether the ALJ properly assessed Plaintiff's  
23 RFC and based the step five finding on an erroneous RFC assessment. Plaintiff requests remand

1 for further administrative proceedings. The Commissioner argues the ALJ's decision has the  
2 support of substantial evidence and should be affirmed.

3 **1. Medical Opinion Evidence**

4 The regulations effective March 27, 2017, require the ALJ to articulate how persuasive the  
5 ALJ finds medical opinions and to explain how the ALJ considered the supportability and  
6 consistency factors. 20 C.F.R. § 416.920c(a)–(b). The “more relevant the objective medical  
7 evidence and supporting explanations presented” and the “more consistent” with evidence from  
8 other sources, the more persuasive a medical opinion or prior finding. *Id.* at § 416.920c(c)(1)–(2).  
9 Further, the Court must continue to consider whether the ALJ’s analysis is supported by substantial  
10 evidence. *Woods v. Kijakazi*, 32 F.4th 785, 787 (9th Cir. 2022); *see also* 42 U.S.C. § 405(g) (“The  
11 findings of the Commissioner of Social Security as to any fact, if supported by substantial  
12 evidence, shall be conclusive . . .”). With these regulations and considerations in mind, the Court  
13 proceeds to its analysis of the medical evidence in this case.

14 **A. Non-Severe Impairments**

15 Plaintiff argues that the ALJ erred by finding Plaintiff’s obstructive sleep apnea (OSA) and  
16 carpal tunnel syndrome (CTS) to be non-severe at step two. Dkt. 13, at 3. The ALJ determined that  
17 the medical evidence failed to establish that these impairments “more than minimally limit[] the  
18 claimant’s ability to perform basic work activities.” AR 21–22. The ALJ cited evidence indicating  
19 that Plaintiff’s OSA was “amendable to control with CPAP therapy,” that an electromyography  
20 showed that Plaintiff’s CTS was mild, and that Plaintiff has not required surgery for his CTS. AR  
21 21–22. Plaintiff has not alleged any specific error to the ALJ’s consideration of this evidence. *See*  
22 *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (declining to  
23 address issues not argued with any specificity). Additionally, where, as here, the ALJ decides step

1 two of the sequential analysis in the claimant's favor, any alleged step two error is harmless. *See*  
2 *Buck v. Berryhill*, 8969 F.3d 11040, 1048–49 (9th Cir. 2017) (because the ALJ “must consider  
3 limitations and restrictions imposed by all of an individual’s impairments, even those that are not  
4 ‘severe,’” the RFC “should be exactly the same regardless of whether certain impairments are  
5 considered ‘severe’ or not”). Therefore, Plaintiff has not shown that the ALJ erred by determining  
6 Plaintiff’s OSA and CTS impairments to be non-severe at step two.

7       B. Dr. William Wilkinson, Ed.D.

8       Dr. Wilkinson examined Plaintiff August 15, 2018, and diagnosed Plaintiff with ADHD,  
9 OCD, and adjustment disorder with anxious mood. AR 418–22. Dr. Wilkinson assessed Plaintiff  
10 with marked limitations in his ability to perform activities within a schedule, maintain regular  
11 attendance, be punctual within customary tolerances without special supervision, and maintain  
12 appropriate behavior in a work setting. AR 420. Dr. Wilkinson assessed moderate to mild  
13 limitations in all other areas of basic work activities. AR 420. Dr. Aaron Burdge, Ph.D. reviewed  
14 Dr. Wilkinson’s report and made the same assessment regarding Plaintiff’s limitations. AR 662–  
15 66.

16       The ALJ did not find Dr. Wilkinson and Dr. Burdge’s opinions to be persuasive. AR 27.  
17 The ALJ found that, “[t]o the extent that the opinions describe vocational unreliability, they are  
18 not consistent with or supported by the claimant’s daily activities or prior work history,” citing  
19 evidence that Plaintiff can follow instructions well, take the bus to appointments and show up  
20 when scheduled, and that Plaintiff successfully showed up and performed a job as a landscaper in  
21 the past. AR 27.

22       Plaintiff argues that the ALJ improperly found Dr. Wilkinson and Dr. Burdge’s opinions  
23 to be inconsistent with Plaintiff’s ability to attend medical appointments, which, Plaintiff argues,

1 does not show that Plaintiff “could reliably perform any type of full-time work.” Dkt. 13, at 4. An  
2 ALJ may reject a medical opinion that is inconsistent with the record or that is inadequately  
3 supported by clinical findings. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008);  
4 *Thomas*, 278 F.3d at 957. Plaintiff reported that he takes the bus by himself, attends church weekly,  
5 does not need reminding to go places, generally does not miss important events or appointments,  
6 and follows both written and spoken instructions well. AR 351–52, 505. In this case, however,  
7 Plaintiff’s ability to attend appointments and follow instructions outside of a work environment  
8 does not reasonably indicate that Plaintiff is able to perform work within a schedule, maintain  
9 attendance, be punctual, and maintain appropriate behavior in a work setting on a regular and  
10 continuing basis. To the contrary, Dr. Wilkinson noted that Plaintiff’s mental health symptoms  
11 have interfered with Plaintiff’s school, appointments, and interactions with others. AR 419–20.  
12 The doctor described in his clinical findings that Plaintiff has “too much attention elsewhere and  
13 loss of details and keeping on task;” is easily distracted; starts but does not complete tasks; is  
14 fidgety, high energy, and impatient; struggles with dealing with unwanted ideas and visuals that  
15 come to his mind; and engages in obsessive and time-consuming routines and behaviors. AR 419–  
16 20. This evidence is reasonably consistent with and supports Dr. Wilkinson and Dr. Burdge’s  
17 opinions that Plaintiff is markedly limited in his ability to perform work within a schedule,  
18 maintain regular attendance, and behave appropriately in a work setting. Therefore, substantial  
19 evidence does not support the ALJ’s finding that Dr. Wilkinson and Dr. Burdge’s opinion were  
20 inconsistent with evidence of Plaintiff’s daily activities or other evidence of record.

21 Plaintiff argues that the ALJ improperly rejected Dr. Wilkinson and Dr. Burdge’s opinions  
22 by finding the opinions inconsistent with Plaintiff’s ability to work in the past, which, Plaintiff  
23 asserts, “does not show that he can currently perform full-time competitive work.” Dkt. 13, at 4.

ORDER

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1 An ALJ may consider whether a claimant's impairments had remained constant and had not  
2 prevented the claimant from working in the past. *See Gregory v. Bowen*, 844 F.2d 664, 667 (9th  
3 Cir. 1988). The ALJ found that Plaintiff's ability to work successfully as a landscaper in the past  
4 indicated that Plaintiff was able to show up and perform a job as scheduled "so long as his job did  
5 not require a significant amount of social interaction." AR 27. The ALJ found that Plaintiff's  
6 "psychological symptoms are long-standing," AR 26; however, the ALJ did not identify any  
7 evidence showing that Plaintiff's other severe and non-severe impairments existed and remained  
8 constant since Plaintiff worked in landscaping. To the contrary, the evidence indicates that Plaintiff  
9 did not have the same combination of mental and physical impairments at the alleged onset date  
10 that Plaintiff had when he performed landscaping work: Plaintiff testified that he worked in  
11 landscaping until around 2010 and 2012 but alleges disabling pain in his cervical and lumbar spine  
12 from a rib injury while landscaping and from being hit by a car in 2015. AR 116, 347, 460, 521.  
13 Therefore, substantial evidence does not support the ALJ's determination that Dr. Wilkinson and  
14 Dr. Burge's opinions were inconsistent with evidence that Plaintiff was able to work in landscaping  
15 in the past.

16       C. Dr. Zachary Feldman, M.D.

17 Dr. Feldman examined Plaintiff on June 2, 2019, and diagnosed Plaintiff with cluster A  
18 personalist disorder, unspecified depression, and unspecified anxiety. AR 502–07. Dr. Feldman  
19 opined that Plaintiff has "exceptionally poor" ability to interact with coworkers, superiors, and the  
20 public and adapt to the usual stresses encountered in the workplace. AR 507. Dr. Feldman further  
21 assessed that Plaintiff has "poor" ability to maintain regular attendance in the workplace and  
22 complete a normal workday without interruptions but opined that, "were [Plaintiff] to find a job  
23 that did not require much work with other people, I suspect he might do quite well." AR 507. Dr.

1 Feldman assessed that Plaintiff has “poor-to-good” ability to perform work duties at a sufficient  
 2 pace depending on the nature of the job and whether Plaintiff is required to work with others. AR  
 3 507. Dr. Feldman assessed that Plaintiff can manage funds independently; has “fair” ability to  
 4 perform simple, repetitive, detailed, and complex tasks; and has “fair” ability to perform work  
 5 activities on a consistent basis without special or additional instructions. AR 507.

6 The ALJ found Dr. Feldman’s opinion to be “partially persuasive.” AR 27. The ALJ found  
 7 that, to the extent that the doctor’s used “programmatic terms, such as poor, mild and good,” the  
 8 doctor opined “on issues reserved to the Commissioner, which is neither valuable nor persuasive.”  
 9 AR 27. Nevertheless, the ALJ found Dr. Feldman’s opinion to be consistent with Plaintiff’s daily  
 10 activities and “at least partially supported by the claimant’s presentation during his examination.”  
 11 AR 27. The ALJ interpreted Dr. Feldman’s opinion as “suggest[ing] the claimant can perform  
 12 simple repetitive tasks that do not require a lot of work with other people.” AR 27.

13 Plaintiff argues that the ALJ improperly rejected Dr. Feldman’s opinion based on his use  
 14 of the terms such as “poor, mild and good.” Dkt. 13, at 8. The ALJ may reasonably conclude that  
 15 a provider’s use of terms that fail to specify a claimant’s functional limitations are not useful for  
 16 determining the RFC. *See Ford v. Saul*, 950 F.3d 1141, 1156 (9th Cir. 2020) (affirming the ALJ’s  
 17 conclusion that the terms “limited” or “fair” were not useful). Here, Dr. Feldman assessed  
 18 Plaintiff’s functional abilities using terms such as “fair,” “poor-to-good,” “poor,” and  
 19 “exceptionally poor,” yet the doctor did not specify the meaning of these terms or how they  
 20 translated into functional limitations. AR 507. Accordingly, the ALJ could reasonably conclude  
 21 the terms “fair” and “poor” were neither valuable nor persuasive for assessing the RFC. *See Rounds*  
 22 *v. Comm’r of Soc. Sec. Admin.*, 807 F.3d 996, 1006 (9th Cir. 2015) (“The ALJ is responsible for  
 23 translating and incorporating clinical findings into a succinct RFC.”). Therefore, substantial

1 evidence supports the ALJ's determination that Dr. Feldman's used terminology that was not  
2 valuable for determining the RFC.

3 Plaintiff argues that the ALJ's interpretation "mischaracteriz[es]" Dr. Feldman's opinion  
4 and "does not fully account for all of the limitations described by Dr. Feldman." Dkt. 13, at 5. Dr.  
5 Feldman assessed that Plaintiff has limited ability to perform work duties, maintain attendance,  
6 complete a normal workday, and interact with others "based on his difficulty maintaining  
7 composure around others" and based on his interpersonal presentation. AR 507. Nevertheless, Dr.  
8 Feldman noted that his assessment "depend[ed] on the nature of the job and whether or not  
9 [Plaintiff] is required to work with other people," and the doctor opined that Plaintiff "might do  
10 well" if he found a job "that did not require much work with other people." AR 507. The RFC  
11 provides that Plaintiff "can perform simple routine tasks and have occasional superficial  
12 interaction with coworkers and the general public," which reasonably accounts for Plaintiff's  
13 symptoms and limitations that Dr. Feldman opined were affected by Plaintiff's interactions with  
14 other people. AR 24, 27; *see Rounds*, 807 F.3d at 1006 (the ALJ is responsible for translating  
15 clinical finding into the RFC). However, the RFC does not reasonably account for Dr. Feldman's  
16 opinion that Plaintiff has limited ability to adapt to the usual stresses encountered in the workplace,  
17 and the ALJ provided no rationale for discrediting this limitation. Therefore, the ALJ erred by  
18 failing to fully account for all of the limitations assessed by Dr. Feldman.

19       D. Other Medical Evidence

20 Plaintiff identifies various medical evidence of record and asserts that "[a]ll of the above-  
21 cited evidence provides further support for [Plaintiff's] testimony, and it undermines the ALJ's  
22 analysis of the evidence and testimony, and shows that the ALJ's residual functional capacity  
23 assessment is not supported by substantial evidence in the record as a whole." Dkt. 13, at 5–14.

1 Plaintiff, however, does not assign specific error to the ALJ's consideration of this evidence. *See*  
2 *Carmickle*, 533 F.3d at 1161 n.2 (declining to address issues not argued with any specificity); *see*  
3 *also Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues  
4 which are argued specifically and distinctly in a party's opening brief. We will not manufacture  
5 arguments for an appellant, and a bare assertion does not preserve a claim. . . ."). Additionally,  
6 none of the evidence cited by Plaintiff states a specific opinion regarding Plaintiff's functional  
7 limitations. "[T]he ALJ is not required to discuss evidence that is neither significant nor  
8 probative." *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003); *see Turner v.*  
9 *Comm'r of Soc. Sec. Admin.*, 613 F.3d 1217, 1223 (9th Cir. 2010) (the ALJ does not need to  
10 provide clear and convincing reasons for rejecting a medical opinion that does not identify any  
11 specific limitations). Therefore, Plaintiff has not shown that the ALJ erred in evaluating this  
12 evidence.

13       E. Non-Examining Physician Opinions

14 Plaintiff argues that the ALJ improperly determined that "the opinions of 'the State agency  
15 consultants' are 'very persuasive,'" arguing that the consultants' opinions are not supported by  
16 objective medical evidence and that the "ALJ's analysis is not supported by substantial evidence  
17 in the record as a whole." Dkt. 13, at 14 (citing AR 27). Plaintiff again fails to assign specific error  
18 to the ALJ's consideration of this evidence, and the Court cannot review an issue that a plaintiff  
19 has failed to argue specifically and distinctly. *See Greenwood*, 28 F.3d at 977. Plaintiff,  
20 nevertheless, asserts that "a reasonable ALJ who properly evaluated the medical evidence and fully  
21 credited the findings and opinions of Dr. Wilkinson and Dr. Feldman could have reached a  
22 different disability determination". Dkt. 13, at 14. However, "the key question is not whether there  
23 is substantial evidence that could support a finding of disability, but whether there is substantial

1 evidence to support the Commissioner's actual finding that claimant is not disabled." *Jamerson v.*  
 2 *Chater*, 112 F.3d 1064, 1067 (9th Cir. 1997). Because Plaintiff has not identified specific error in  
 3 the ALJ's evaluation of the consultants' opinions, Plaintiff has not shown that the ALJ erred.

4 **2. Subjective Testimony**

5 The ALJ must provide specific, clear, and convincing reasons, supported by substantial  
 6 evidence, for rejecting a claimant's subjective symptom testimony.<sup>2</sup> *Trevizo v. Berryhill*, 871 F.3d  
 7 664, 678 (9th Cir. 2017); *Smolen v. Chater*, 80 F.3d 1273, 1286 (9th Cir. 1996). An ALJ may reject  
 8 a claimant's symptom testimony when it is contradicted by the medical evidence, but not when it  
 9 merely lacks support in the medical evidence. *See Carmickle*, 533 F.3d at 1161 ("Contradiction  
 10 with the medical record is a sufficient basis for rejecting a claimant's subjective  
 11 testimony."); *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005) ("[L]ack of medical evidence  
 12 cannot form the sole basis for discounting pain testimony.").

13 Plaintiff alleges that he is unable to work due to disabling pain from his cervical and lumbar  
 14 spine issues, which Plaintiff alleges totally disables his upper body, causes numbness in his leg,  
 15 and makes him unable to walk. AR 347. At the hearing, Plaintiff testified that he experiences pain  
 16 in his upper back, where he tore a rib, and that there are times that he cannot move due to pain,  
 17 which happens "not horribly often" because he has learned to take precautions. AR 116–18.  
 18 Plaintiff further testified that he experiences numbness and pain in his hands, joint pain, and  
 19 difficulty sitting or standing for long. AR 116–17, 123–240. Plaintiff further alleges that he has  
 20 had ADHD and OCD since he was born, has problems thinking clearly, has trouble sleeping, and  
 21

22 <sup>2</sup> Effective March 28, 2016, the Social Security Administration (SSA) eliminated the term "credibility"  
 23 from its policy and clarified the evaluation of a claimant's subjective symptoms is not an examination of  
 character. SSR 16-3p. The Court continues to cite to relevant case law utilizing the term credibility.

1 can manage a normal conversation if he is “completely relaxed.” AR 121–23, 342.

2 The ALJ found that Plaintiff’s “medically determinable impairments could reasonably be  
3 expected to cause the alleged symptoms; however, the claimant’s statements concerning the  
4 intensity, persistence and limiting effects of these symptoms are not entirely consistent with the  
5 medical evidence and other evidence in the record.” AR 25.

6 Plaintiff argues that the ALJ improperly rejected Plaintiff’s symptom testimony based on  
7 inconsistency with the medical evidence. Dkt. 13, at 15–16. “While subjective pain testimony  
8 cannot be rejected on the sole ground that it is not fully corroborated by objective medical  
9 evidence, the medical evidence is still a relevant factor in determining the severity of the claimant’s  
10 pain and its disabling effects.” *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *see* 20  
11 C.F.R. § 416.1529(c)(4) (“Your symptoms, including pain, will be determined to diminish your  
12 capacity for basic work activities to the extent that your alleged functional limitations and  
13 restrictions due to symptoms, such as pain, can reasonably be accepted as consistent with the  
14 objective medical evidence and other evidence.”). Here, the ALJ found that, although Plaintiff  
15 reported that his back pain began “more than 10 years ago when his rib was ripped off his spine,”  
16 “the medical evidence does not establish that such an extreme event ever occurred.” AR 25. The  
17 ALJ further found that, although medical imaging “confirm[ed] degenerative disc disease,  
18 including some spondylosis, in the claimant’s cervical, thoracic and lumbar spine . . . there is no  
19 stenosis, impingement or similar findings” and that physical examinations indicated that Plaintiff  
20 retained bilateral upper extremity strength and was able to lift and move 25 pounds. AR 25 (citing  
21 AR 542, 545). The ALJ further noted that, although Plaintiff was observed to walk with a limp  
22 during Plaintiff’s psychological evaluation and SSA interview, Plaintiff’s physical examinations  
23 “many times” showed Plaintiff had a normal gait and good muscle strength. AR 25 (citing AR

1 464, 483–44, 778); *see Carmickle*, 533 F.3d at 1164 (“The ALJ is responsible for resolving  
2 conflicts in the medical record.”). The ALJ thus reasonably determined that the medical evidence  
3 was inconsistent with Plaintiff’s subjective testimony and indicated that, during the relevant  
4 period, Plaintiff’s back impairments were not as extreme or as limiting as Plaintiff alleged.  
5 Therefore, the ALJ’s rejection of Plaintiff’s allegations of disabling back pain based on  
6 inconsistency with the medical evidence of record was specific, clear, and convincing and  
7 supported by substantial evidence.

8 Plaintiff argues that the ALJ improperly rejected Plaintiff’s symptom testimony by finding  
9 it inconsistent with evidence of Plaintiff’s activities. Dkt. 13, at 16–17. An ALJ may use evidence  
10 of a claimant’s activities when evaluating a claimant’s testimony to show inconsistency with the  
11 testimony or to show that the claimant’s activities meet the threshold for transferable work skills.  
12 *See Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). Here, the ALJ cited evidence that Plaintiff  
13 reported being able to travel to appointments on multiple buses and walk long distances while  
14 carrying a backpack. AR 25–26 (citing AR 487–88). The ALJ determined that the evidence of  
15 Plaintiff activities “suggests he retains a much better level of functioning than he described at the  
16 hearing.” AR 25–26. Plaintiff activities are reasonably inconsistent with Plaintiff’s allegations of  
17 disabling back pain. Therefore, the ALJ’s rejection of Plaintiff’s symptom testimony regarding  
18 Plaintiff’s back pain based on inconsistency with evidence of Plaintiff’s activities was specific,  
19 clear, and convincing and supported by substantial evidence.

20 Plaintiff alleges that the ALJ improperly rejected Plaintiff symptom testimony based on  
21 evidence that Plaintiff’s “psychologically based symptoms are long-standing, and the evidence  
22 does not establish that they worsened on the amended AOD [alleged onset date] or thereafter.”  
23 Dkt. 13, at 16–17 (citing AR 26). The ALJ determined that Plaintiff’s treatment for his

1 psychological impairments “has been quite limited” and that the evidence does not indicate that  
2 Plaintiff is unable to perform all work. AR 26. The Ninth Circuit has “particularly criticized the  
3 use of a lack of treatment to reject mental complaints both because mental illness is notoriously  
4 underreported and because it is a questionable practice to chastise one with a mental impairment  
5 for the exercise of poor judgment in seeking rehabilitation.” *Regennitter v. Comm’r of Soc. Sec.*  
6 *Admin.*, 166 F.3d 1294, 1299–1300 (9th Cir. 1999) (internal quotation marks and citations  
7 omitted). Here, the ALJ noted that Plaintiff “was described as having poor insight/judgment, poor  
8 attention/concentration and poor recent memory” during a mental health treatment intake meeting  
9 in July 2019 but determined that Plaintiff “did not consistently present in that fashion,” citing  
10 records in which Plaintiff was “described as having fair to good attention, concentration, memory,  
11 judgment, and insight.” AR 26. However, the ALJ’s evaluation fails to consider the opinions and  
12 clinical findings assessed by Dr. Wilkinson and Dr. Burdge, which, as discussed above, the ALJ  
13 improperly rejected. Therefore, the ALJ’s rejection of Plaintiff’s testimony regarding his mental  
14 health symptoms was not specific, clear, or convincing.

15 As discussed above, substantial evidence supports the ALJ’s evaluation of Plaintiff’s  
16 symptom testimony regarding disabling back pain; however, substantial evidence does not support  
17 the ALJ’s rejection of Plaintiff’s symptom testimony regarding Plaintiff’s mental health  
18 impairments. The ALJ’s error was not harmless because it resulted in an RFC assessment that did  
19 not account for all of Plaintiff’s mental health limitations.

20 **3. Lay Witness Testimony**

21 Plaintiff argues that the ALJ failed to evaluate properly the lay witness statement from SSI  
22 facilitator Cindy Harbaugh. Dkt. 13, at 18. “Lay testimony as to a claimant’s symptoms is  
23 competent evidence that an ALJ must take into account, unless he or she expressly determines to

1 disregard such testimony and gives reasons germane to each witness for doing so.”<sup>3</sup> *Lewis v. Apfel*,  
 2 236 F.3d 503, 511 (9th Cir. 2001). However, an error in addressing lay witness testimony may be  
 3 deemed harmless where “it is inconsequential to the ultimate nondisability determination.”  
 4 *Carmickle*, 533 F.3d at 1162.

5 Plaintiff argues that the ALJ’s evaluation of Ms. Harbaugh’s observations is “overly  
 6 selective” and “fails to acknowledge and fails to adequately account for any of Ms. Harbaugh’s  
 7 observations, which are consistent with [Plaintiff’s] testimony about his symptoms and  
 8 limitations.” Dkt. 13, at 18. The ALJ considered Ms. Harbaugh’s observations that, during the  
 9 interview, Plaintiff “was polite, cooperative, had good grooming, and generally did just fine from  
 10 a mental perspective.” AR 26. However, Plaintiff argues that the ALJ failed to consider Ms.  
 11 Harbaugh’s observations that Plaintiff had pain when standing, walking, and sitting, walked with  
 12 a limp, rocked back and forth while seated, spoke with a monotone and little emotion, and had  
 13 trouble with his memory and answering questions. Dkt. 13, at 18 (citing AR 368).

14 Even if the ALJ erred when considering Ms. Harbaugh’s observations, such error would  
 15 be harmless in this case. The lay witness does not identify any symptoms that were not described  
 16 by Plaintiff—indeed, Plaintiff concedes that Ms. Harbaugh’s observations were consistent with  
 17 Plaintiff’s testimony about his symptoms and limitations. Dkt. 13, at 18; *see Molina v. Astrue*, 674  
 18 F.3d 1104, 1117 (9th Cir. 2012) (failure to address lay testimony is harmless “[w]here lay witness  
 19 testimony does not describe any limitations not already described by the claimant, and the ALJ’s  
 20 well-supported reasons for rejecting the claimant’s testimony apply equally well to the lay witness  
 21 testimony”), *superseded by regulation on other grounds*. Further, Ms. Harbaugh’s observations

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22  
 23 <sup>3</sup> The Ninth Circuit has not yet addressed the 2017 regulations in relation to the standard of review for lay  
 witness opinions.

1 are contradicted by more reliable medical evidence that the ALJ credited, including physical  
2 examinations showing Plaintiff having a normal gait, good muscle strength, and the ability to lift  
3 25 pounds, and Dr. Feldman's opinion that Plaintiff might be able to work in a job with simple  
4 repetitive tasks and "that did not require much work with other people." *See Molina*, 674 F.3d at  
5 1118–19 (failure to discuss a lay witness's testimony harmless "where the testimony is similar to  
6 other testimony that the ALJ validly discounted, or where the testimony is contradicted by more  
7 reliable medical evidence that the ALJ credited"). Therefore, any error in the ALJ's evaluation of  
8 Ms. Harbaugh's observations would be inconsequential to the nondisability decision. *See Stout v.*  
9 *Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006) (an ALJ's error may be deemed  
10 harmless where it is "inconsequential to the ultimate nondisability determination").

11 **4. RFC**

12 At step four, the ALJ must identify the claimant's functional limitations or restrictions and  
13 assess their work-related abilities on a function-by-function basis. *See* 20 C.F.R. § 416.945; SSR  
14 96-8p. The RFC is the most a claimant can do considering their limitations or restrictions. *See* SSR  
15 96-8p. The ALJ must consider the limiting effects of all of the claimant's impairments, including  
16 those that are not severe, in assessing the RFC. 20 C.F.R. § 416.945(e); SSR 96-8p.

17 As discussed above, substantial evidence does not support the ALJ's evaluation of Dr.  
18 Wilkinson and Dr. Burge's medical opinions or the ALJ's rejection of Plaintiff's testimony  
19 regarding disabling mental health symptoms. The ALJ further failed to fully account for all of the  
20 limitations assessed by Dr. Feldman. As a result, the RFC does not reasonably account for  
21 limitations in Plaintiff's ability to perform activities within a schedule; maintain regular  
22 attendance; be punctual within customary tolerances without special supervision; maintain  
23 appropriate behavior in a work setting; and adapt to the usual stresses encountered in the

1 workplace. Therefore, this matter should be reversed and remanded for further administrative  
2 proceedings so that the ALJ may reevaluate the medical opinion evidence, reevaluate Plaintiff's  
3 subjective symptom testimony, and reassess the RFC and step five finding as warranted by further  
4 consideration of the evidence.

5 **CONCLUSION**

6 For the reasons set forth above, this matter is REVERSED and REMANDED for further  
7 administrative proceedings.

8 DATED this 20th day of April, 2023.

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11 MARY ALICE THEILER  
12 United States Magistrate Judge  
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